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May 25 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 30, 2004

Case No.: TIA-0180

xxxxxxxxxxxxx (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits on behalf of her late husband (the Worker). An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a laborer and cement mason at the Paducah Gaseous Diffusion Plant (the plant). The application stated that he worked at the plant for approximately 2 years -- from 1951 to 1953. The Applicant requested physician panel review of two illnesses -- colon cancer and liver cancer. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the Worker's claimed conditions. For the colon cancer, the Panel cited a weak association between radiation exposure and colon cancer and the lack of significant radiation exposure data. Additionally, the Panel cited numerous non-occupational risk factors as being strongly related to the onset of colon cancer. Finally, the Panel determined that there was too great a

latency period between the Worker's employment at the plant and the onset of the cancer for the two to be related. For the liver cancer, the Panel found that it represented metastasis from the colon cancer. Because the Panel found that the liver cancer was a metastasis of the colon cancer, the Panel referred to its determination on the colon cancer claim. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In the appeal, the Applicant disagrees with the Panel determination on the Worker's conditions. The Applicant states that the Worker did not suffer from the claimed conditions prior to working at the plant. The Applicant also noted that many of the Worker's colleagues were diagnosed with similar conditions and passed away as a result. The Applicant alludes to a pulmonary condition that was not considered by the Panel.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant has not demonstrated Panel error. As an initial matter, we note that the Applicant did not ask for physician panel review of a pulmonary illness and, therefore, the Panel's failure to consider it was not Panel error. For the claimed illnesses, colon and liver cancer, the Panel addressed each illness, made a finding, and explained the basis for that finding. To the extent that the Applicant disagrees with the Panel's assessment of the documented exposures, the Applicant's argument is a disagreement with the Panel's judgment, rather than an indication of Panel error. If the Applicant would like to claim a pulmonary condition, she should raise this issue with the DOL.

As the foregoing indicates, the Applicant has not identified Panel error and, therefore, the appeal should be denied. In

compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0180, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 25, 2005